SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 899

COMMUNITY FUNDING CORPORATION,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; HAROLD E. WALTON, Custodian of Records, Federal Housing Administration,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District and Appendices.

HOWARD I. FRIEDMAN,
1600 One Wilshire Building,
Los Angeles, Calif. 90017,
Attorney for Petitioner.

ANDREW S. GARB and
LOEB AND LOEB,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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IN THE

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No. .....

COMMUNITY FUNDING CORPORATION,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; HAROLD E. WALTON, Custodian of Records, Rederal Housing Administration,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioner, Community Funding Corporation, respectfully prays that a writ of certiorari issue to the Court of Appeal of the State of California, Second Appellate District, to review that court's denial of petitioner's petition for a writ of mandate directed to respondent court. The Supreme Court of California denied a petition for hearing in said court.*

*The petition for certiorari is properly directed to the Court of Appeal where that court's decision is denied review by the California Supreme Court. [See *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).]

Opinion Below.

The Court of Appeal rendered no opinion. Its order denying Petition for Writ of Mandate is set forth in Appendix A hereto. The Supreme Court of California denied a Petition for Hearing and rendered no opinion. The respondent court, in its decision upon which the Petition for Writ of Mandate was based, rendered an unreported minute order containing an opinion which is set forth in Appendix B hereto.

Jurisdiction.

The decision of the Court of Appeal sought to be reviewed was rendered and entered on September 2, 1969. A Petition for Hearing in the Supreme Court of California was filed on September 12, 1969. On October 29, 1969, that Court denied said Petition for Hearing with one Justice voting in favor of granting a hearing.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

This Court's review by certiorari is sought on the grounds that the decision of the Court of Appeal has determined substantial questions of federal law arising under the Freedom of Information Act [5 U.S.C. §552] and the Housekeeping Statute [5 U.S.C. §301] as amended in 1958 [72 Stat. 547] which have not heretofore been determined by this Court and in a manner not in accord with the requirements of public accessibility to governmental documents sought to be provided by said statutes.

Questions Presented.

1. Do state courts have concurrent jurisdiction with the United States District Courts to assure the availability of documents to the public and interested parties as required under the Freedom of Information Act?

2. May a state court, in the course of discovery proceedings in litigation to which the United States or its governmental agencies are not parties, require the production by the United States or its agencies of documents required under normal discovery standards in the state court litigation?

3. Does this Court's decision in *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1950), decided prior to the 1958 amendment to the Housekeeping Statute [5 U.S.C. §301] and the enactment of the Freedom of Information Act [5 U.S.C. §552], insulate an employee of the United States having custody of records and documents from enforcement orders to produce said documents where such orders would properly apply in litigation between private, nongovernmental parties?

Statutes and Regulations Involved.

1. The Federal Housekeeping Statute, 5 U.S.C. §301. Printed in Appendix C hereto.
2. The Federal Freedom of Information Act, 5 U.S.C. §552. Printed in Appendix D hereto.
3. 24 C.F.R. §§15.21 and 15.52. Printed in Appendix E hereto.

Statement of the Case.

A. The Proceedings in Respondent Court.

The within cause stems from proceedings occurring in Respondent Court in a suit now pending in said Court entitled "Community Funding Corporation, a corporation, plaintiff, vs. Los Feliz Towers Apartments, etc., et al., defendants", being No. 910109 in the files and records of said Court. That action involves a dispute between plaintiff therein and defendants United States National Bank and Irving Trust Company over the enforceability of a contractual commitment by plaintiff and by United California Bank to purchase from United States National Bank and Irving Trust Company a $5,254,800.00 FHA insured mortgage on a large apartment building complex in Los Angeles, California. The project was required to be constructed in accordance with and pursuant to the procedures of the Federal Housing Administration and was to be a fully insured Federal Housing Administration project. Although the Federal Housing Administration is not a party to said action in Respondent Court, it is inextricably involved in the controversy pending in said Court by virtue of the fact that the course of procedure followed by the borrower and by the interim lenders (United States National Bank and Irving Trust Company) before the Federal Housing Administration bears directly upon the controversy. [See Record, Petition for Writ of Mandate, ¶¶ 2, 3, and 4; Exhibits A, B, C and D.]

Respondent Harold E. Walton is the duly authorized custodian of records of the Federal Housing Administration in Los Angeles. Petitioner (plaintiff in the action pending in Respondent Court) sought to examine cer-

tain of the internal records of the Federal Housing Administration relating to said project. The effort to secure such examination was pursued in the ordinary course of discovery proceedings which took place in Respondent Court under the applicable discovery standards provided by California law. [Calif. Code of Civ. Proc. §§2016, *et seq.*] A *subpoena duces tecum* was duly issued by Respondent Court and was duly served upon respondent Harold E. Walton as custodian of said records. [Record, Petition for Writ of Mandate, ¶¶ 5, 6 and 7; Exhibits E, F, G, H and I.] After the *subpoena duces tecum* was served, the Federal Housing Administration, by appropriate proceedings in Respondent Court, moved to "quash subpoena duces tecum served on Federal Housing Administration". [Record, Exhibit "F".] The motion of the Federal Housing Administration was made upon the express ground that "the documents sought by said subpoena duces tecum are protected from disclosure by federal statute". Said motion asserted that the documents were insulated from production as internal documents exempt from disclosure pursuant to the Federal Freedom of Information Act [5 U.S.C. §552(b)(5).] Respondent Court denied said motion to quash, holding that said documents were not exempt from disclosure under the Freedom of Information Act. [Record, Exhibit G.]*

*The motion to quash was not asserted by the Custodian of Records. Rather, it was made by the Federal Housing Administration itself. Thus, the governmental agency affected has unqualifiedly appeared before Respondent Court and asserted its claim that the documents are not subject to disclosure. The voluntary appearance by the government agency on the motion to quash manifestly constitutes a subjection by the Federal Housing Administration to the jurisdiction of Respondent Court. [See, *e.g., Kennedy, v. David*, 109 F. 2d 676, 677 (D.C. Cir. 1940);

(This footnote is continued on the next page)

After the denial of the motion to quash filed on behalf of the Federal Housing Administration, respondent Harold E. Walton appeared for his deposition pursuant to *subpoena duces tecum.* At said deposition, he refused to produce the documents referred to in said *subpoena duces tecum,* the propriety of which had been determined by Respondent Court in its order denying said motion to quash, upon the express ground that he had received instructions from his superiors in the Department of Housing and Urban Development not to produce said documents. The transcript of the deposition appears in full in the Record herein. [Record, Exhibit J.] The refusal was asserted with the submission by said respondent of a directive addressed to him from Sherman Unger, General Counsel to the Department of Housing and Urban Development, which directive stated:

> "You are authorized to appear in response to said subpoena, but you are instructed not to produce records or documents relating to intra-agency or inter-agency memoranda or letters sought by the subpoena, or to orally testify to the contents thereof." [Record, Exhibit K.]

Upon the refusal of respondent Harold E. Walton to produce said documents at the deposition, the deposition was duly adjourned and petitioner moved the Respondent Court for an order compelling the production of the documents specified in the *subpoena duces tecum.* [Rec-

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Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F. 2d 871, 873-4, (3d Cir. 1944) cert. den. 322 U.S. 740; *The Uxmall,* 40 F. Supp. 258, 260 (D. Mass. 1941); *Jos. Riedel Glass Works v. Keegan,* 43 F. Supp. 153, 159 (D. Me. 1942).] Thus, any issue concerning the absence of the governmental agency as an entity from the ambit of the ruling of Respondent Court is not applicable. [See *United States v. Reynolds,* 345 U.S. 1, 8-10 (1952).]

ord, Petition for Writ of Mandate, ¶ 8; Exhibits L and M.] Said motion was duly made pursuant to California Code of Civil Procedure §2034. Respondent Court, on August 15, 1969, duly entered its order denying said motion. [Record, Exhibit N.] The order of Respondent Court stated as follows:

> "It appears to the Court that the documents covered by the Subpoena Duces Tecum are relevant to the subject matter of the action and not privileged. Moreover, it appears that they are available to the public under 5 U.S.C., Sec. 552(b)(5) and 24 C.F.R. 915.21(a)(5), since they would be available by law to a party . . . in litigation with the Government agency. Good cause has been shown for the production of the documents. Harold E. Walton is normally the custodian of the documents, but his authority to deal with them has been terminated by the General Counsel of the Department of Housing and Urban Development pursuant to 24 C.F.R. Sec. 15.52. Thus, he no longer has the documents under his control and it would be an idle act to order him to produce them. See *U.S. Ex Rel. Touhy v. Ragen,* 340 U.S. 462 and *People v. Parham,* 60 Cal. 2d 378.
>
> "The motion is denied."

The order of Respondent Court constitutes a reaffirmance by it of the availability and accessibility of the requested documents pursuant to the provisions of the Federal Freedom of Information Act, and further determined that all requirements for the production of records under applicable California procedural law had been met. The sole ground for refusing a further implementing order to produce said documents was the

determination of Respondent Court that respondent Harold E. Walton's authority to permit the disclosure of said documents had been terminated by his superiors, and that under the decision of this Court in *U.S. ex rel. Touhy v. Ragen,* 340 U.S. 462 (1950), any further order directed to said respondent would be an idle act.

B. The Proceedings in the California Court of Appeal and the California Supreme Court.

In accordance with California practice, petitioner promptly initiated original proceedings in the Court of Appeal of the State of California for the Second Appellate District seeking a peremptory writ of mandate directed to Respondent Court requiring said court to vacate its order denying petitioner's motion for an enforcement order compelling the production of said documents.* On September 2, 1969 the Court of Appeal denied said petition without opinion and declined to issue an alternative writ of mandate.**

A timely petition for hearing in the California Supreme Court was filed on September 12, 1969. Said petition was denied on October 29, 1969 with Justice Stanley Mosk voting in favor of granting the hearing.

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*Under California practice, the proper review of an order denying implementing orders in discovery is by way of an original writ of mandate proceeding. [See, *e.g., Greyhound Corp. v. Superior Court,* 56 Cal. 2d 355, 379, 364 P. 2d 266 (1961); *Oceanside Union School Dist. v. Superior Court,* 58 Cal. 2d 180, 185, 373 P. 2d 439 (1962); *Singer v. Superior Court,* 54 Cal. 2d 318, 327, 353 P. 2d 305 (1960).]

**California practice provides for an alternative writ of mandate in original mandate proceedings. The Court is empowered to deny the petition without issuing the alternative writ. When it does so, no answer is required from respondents. [See Calif. Code of Civ. Proc. §§1087, 1107; *Metropolitan Water Dist. v. Adams,* 19 C. 2d 463, 468, 122 P. 2d 257 (1942).]

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The enactment of the Freedom of Information Act in 1966 and the amendment to the Federal Housekeeping Statute in 1958* culminated an historic struggle to expose the records of the Federal government to disclosure in the public interest and thereby reverse the traditional governmental refusal to make its records available to public scrutiny.** The spirit animating those

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*That amendment added the following language to 5 U.S.C. §301: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

**The 1958 amendments to the Housekeeping Statute occurred after a ten year effort in the Congress to "correct" the situation previously obtaining where "executive officials have let every file clerk become a censor". [H. Rep. No. 1461, 85 Cong. 2d Sess. 1958, accompanying H.R. 2767.] The highlights of the legislative history are set forth in 2 U.S. Code, Congressional & Administrative News, pp. 3352-3412 85th Cong., 2d. Sess. (1958).

The highlights of the legislative history leading to the enactment of the Freedom of Information Act are found in: S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758 and S. 1879, Administrative Procedure Act, 89th Cong., 1st Sess. 1965; Hearings before the Subcommittee of the House Committee on Government Operations, on H.R. 5012-21, 5237, 5406, 5520, 5583, 6172, 6739, 7010 and 7161, Federal Public Records Law, 89th Cong., 1st Sess. 1965; Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act, 88th Cong., 2d Sess., 1964; Hearings before the Subcommittee of the House Committee on Government Operations, Government Information, Plans and Policies, 88th Cong., 1st Sess., (1963); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1966 and S. 1663, Freedom of Information, 88th Cong. 2d Sess. (1963); Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on S. 921, Freedom of Information and Secrecy in Government, 85th Cong., 2d Sess. (1958); 103 Cong. Rec.

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enactments was well stated by President Johnson upon his signing Public Law 89-487 on July 4, 1966 (The Freedom of Information Act) when he described the legislation as confirmation "that the United States is an open society in which the people's right to know is cherished and guarded". Attorney General Ramsey Clark characterized the "key concerns" of the Congress and the President in the enactment of the legislation as being "that disclosure be the general rule, not the exception . . . that the burden be on the government to justify the withholding of the document, not the person who requests it . . . [and] that there be a change in government policy and attitude". [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, p. iv (June, 1967).]

Notwithstanding the manifest purpose of the legislation to assure disclosure, it was early recognized that only the courts will be able to enforce the legislations' historic reversal in traditional government insistence upon concealment and secrecy. Professor Kenneth Davis immediately saw that the executive branch of the government would resist the provisions of the statute "until a high court holds otherwise" and that "in many vast fields of administration no case will be brought to compel disclosure, and the officers will know that such a case is unlikely". [Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chic. L. Rev. 761,

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7491-92; 104 Cong. Record 6547-75; 104 Cong. Record 15,688-99; 110 Cong. Record 17,806-89; 110 Cong. Record 17,666-68; 111 Cong. Record 26,820; 112 Cong. Record 13,007.

805 (1967).] The record of the instant cause demonstrates that Professor Davis' apprehensions were well-founded.*

The documents sought by petitioner were claimed by the affected agency, to wit: the Federal Housing Administration, to be exempt from disclosure under the provisions of exemption 5 of the Freedom of Information Act which exempts "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." [5 U.S.C. §552(b)(5).] That exemption, like all of the exemptions referred to in subparagraph "b" of the Act, is subject to the provisions of subparagraph "c" of the Act, which states:

> "This Section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this Section."

Believing that the documents were subject to the claimed exemption, the Federal Housing Administration appropriately and in conformance with law appeared before Respondent Court and sought to quash the *subpoena duces tecum* served upon its custodian. Upon

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*Much of the literature surrounding the enactment of the Freedom of Information Act presaged continuing governmental resistance to its provisions. See, generally, Note, *The Information Act; Judicial Enforcement of the Records Provision,* 54 Va. L. Rev. 466 (1968); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill,* 40 Notre Dame Law. 417 (1965); Note, *Freedom of Information: The Statute and the Regulations,* 56 Geo. Law. Journ. 18 (1967); Note, *The Federal Freedom of Information Act as an Aid to Discovery,* 54 Iowa L. Rev. 141 (1968); Sky, *Agency Implementation of the Freedom of Information Act,* 20 Admin. L. Rev. 447 (1968); Wosencraft, *The Freedom of Information Act—the First Thirty-Six Days,* 20 Admin. L. Rev. 249 (1968); Note, *The Freedom of Information Act: Access to Law,* 36 Fordham L. Rev. 765 (1968).]

that appearance, the Respondent Court considered the applicability of the cited exemption and held that the documents requested would be available to private parties engaged in litigation with the agency. That determination adjudicated the claim to exemption.* Having sought and received its day in court on its claimed exemption, the Federal Housing Administration nevertheless refused to comply with the order of Respondent Court requiring the production of said documents. Its sole justification in so doing was the contention that the Court was powerless to enforce its order by virtue of a supervening directive to the custodian from his superior directing him to withold the documents. And the authority for that remarkable position was this Court's decision in *U. S. ex rel. Touhy v. Ragen,* 340 U.S. 462 (1950), a case decided before the enactment of the Information Act and before the amendment to the Housekeeping Statute.

Review by way of certiorari is required in this Court for the transcendent reason that only such review can assure the implementation of the provisions of the Information Act over the unilateral refusal of the affected agency to comply with the law. The very integrity of the disclosure requirements now embodied in Federal law is at stake in this proceeding. Only this Court can assure the vitality and enforceability of the vital policy articulated in the Information Act.

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*The court's determination on the merits accords with the limited judicial exegesis concerning the scope of exemption 5. [See *Benson v. General Services Administration,* 289 F. Supp. 590 (W.D. Wash. 1968) *aff'd.* 415 F. 2d 878 (9th Cir. 1969); *Martin v. Neuschel,* civil action No. 68-301, E.D. Pa. (February 13, 1968) (decision unreported) rev'd. on other grounds, 396 F. 2d 759 (3d Cir. 1968). Compare *Bristol-Meyers Co. v. Fed. Trade Comm.,* 284 F. Supp. 745 (D.C. 1968).]

I.

Pursuant to the Federal Freedom of Information Act and to the Housekeeping Statute, Governmental Documents Not Qualifying for Exemption From Disclosure Are Available for Disclosure in the Course of State Court Proceedings in Which They Are Otherwise Discoverable.

Although the Federal Housing Administration, by invoking the jurisdiction of Respondent Court in an effort to quash the *subpoena duces tecum,* acknowledged the power of Respondent Court to determine the availability of the requested documents under the provisions of the Federal Freedom of Information Act, respondent custodian urged to the California Supreme Court that only a suit in the United States District Court in which jurisdiction could be obtained over the Secretary of the Department of Housing and Urban Development in Washington, D. C. could properly reach the documents. [Record, Opposition to Petition for Hearing in the Supreme Court, p. 7.] Implicit in the position of said respondent is that the Information Act and the provisions for judicial enforcement of its terms can be adjudicated only by the United States District Court and not by State courts. That contention raises a transcendent question of interpretation in the administration of the provisions of the Act itself.

The practical consequences of the Government's contention in this regard are that private litigants engaged in litigation in the State courts in which governmental documents are required under normal discovery standards are compelled to engage in two lawsuits rather than one. Governmental documents would thereby be immunized from the operation of State discovery laws

and only the United States District Court could determine the availability of such documents for public disclosure, including disclosure in the course of existing State court litigation. Such a practical compounding of litigation can result only if the Federal Freedom of Information Act can be construed so as to confer exclusive jurisdiction upon the United States District Courts. Such a construction can be upheld only if the manifest purpose of the Federal statute appears to require the repudiation of the normal standards of concurrent jurisdiction and an insistence upon exclusive jurisdiction.

The normal rule, repeatedly articulated by this Court, is that State courts have concurrent jurisdiction in cases arising under the laws of the United States, except where concurrent jurisdiction is excluded by express statutory provision or by a manifest incompatibility between concurrent jurisdiction and the powers to be exercised under the particular statutory enactment. [*E.g., Dowd Box Co. v. Courtney,* 368 U.S. 502, 508 (1962); *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 101 (1962); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243 (1942); *Robb v. Connolly,* 111 U.S. 624, 635-7 (1884); *Claflin v. Housman,* 93 U.S. 130, 136 (1876).] The operative principle as stated by this Court in *Claflin v. Housman,* 93 U.S. 130, 136 (1876) is that concurrent jurisdiction is the general rule "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." Typically, the cases arise where the Federal statute confers jurisdiction upon the District Courts to hear certain specified types of controversy. [See *e.g.* Section 301 (a) of the Labor-Management

Relations Act of 1947, 29 U.S.C. §185; Section 33 of the Jones Act, 46 U.S.C. §688; Sections 308 (b)(B) and 308 (e) of the G. I. Bill of Rights, 50 App. U.S.C. §459(d).] In each of the foregoing instances, the express grant of jurisdiction to the United States District Courts has been held not to deprive State courts of concurrent jurisdiction to enforce the provisions thereof. [*Dowd Box Co. v. Courtney,* 368 U.S. 502, 507 (1962); *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243 (1942); *Tsang v. Kan,* 173 F. 2d 204, 205 (9th Cir. 1949) *cert. den.* 337 U.S. 939 (1949).]

The provisions of the Federal Freedom of Information Act conferring jurisdiction upon the District Courts for the enforcement of the disclosure provisions of the Act are almost identical to the cited statutes.* There is no suggestion in the Act that the jurisdiction thereby conferred shall be exclusive, nor is there any suggestion that we have found in in any of the legislative history to that effect. Moreover, the inherent character of the rights created in the public for disclosure of governmental documents are not impaired in the slightest by the recognition of concurrent jurisdiction over their enforcement in the State courts. Indeed, such concurrent jurisdiction more expeditiously and meaningfully implements the substantive provisions of the Freedom of Information Act itself.

The far-reaching reform represented by the Information Act in its requirements of disclosure being the rule and not the exception requires that disclosure be made

*The Act provides that "on complaint, the district court of the United States . . . has jurisdiction . . . to order the production of any agency records improperly withheld from the complainant". 5 U.S.C. §552(a)(3).

in all contexts in which disclosure would conform to the statutory standard. The amenability of government documents to disclosure in the course of ordinary discovery proceedings in State court litigation constitutes an area in which disclosure is most beneficent and required. Review by this Court so as to assure the concurrent jurisdiction of State courts in the enforcement of the Act is vitally required in order to enforce properly the broad gauged principles of the Act itself. To sanction the conduct of the Government in the case at bar carves out of the Freedom of Information Act a gaping area of non-enforceability where enforceability is most urgently required.

II.

This Court's Decisions in U. S. Ex Rel. Touhy v. Ragen, 340 U. S. 462 (1950) and Boske v. Comingore, 177 U. S. 459 (1900) Do Not Insulate Governmental Agents From Appropriate Enforcement Orders Requiring the Production of Documents After a Judicial Determination of Their Availability Under the Provisions of the Freedom of Information Act.

Respondent Court adjudicated the availability of the requested documents under the Freedom of Information Act. When the government refused to permit its duly constituted custodian to divulge and produce said documents, Respondent Court felt itself incapacitated from entering normal enforcement orders under applicabile discovery standards solely by virtue of this Court's 1950 decision in *U. S. ex rel. Touhy v. Ragen,* 340 U.S. 462 (1950).* That decision, in view of the sub-

*The court also relied on *People v. Parham,* 60 C. 2d 378, 384 P. 2d 1001 (1963) *cert, den.* 377 U.S. 945. That decision merely followed *Touhy* and *Boske.* [60 C. 2d at 381.]

sequent enactment of amendments to the Housekeeping Statute expressly providing that the Housekeeping Statute "does not authorize withholding information from the public or limiting the availability of records to the public" and the subsequent enactment of the Freedom of Information Act itself cannot properly be held to incapacitated State courts from rendering appropriate enforcement orders against recalcitrant governmental agencies and employees. A decision by this Court is accordingly necessary in order to clarify what, if anything, remains vital and operative in the principles enunciated in *U. S. ex rel. Touhy v. Ragen.*

Touhy held that a subordinate government official could not be held in contempt of court if he refused to disclose documents in reliance upon an order of nondisclosure issued to him by his superior. *Touhy* was expressly premised upon this Court's prior decision in *Boske v. Comingore,* 177 U.S. 459 (1900). In *Touhy,* the official who had given the instruction to the subordinate was not before the Court and only the subordinate official was before the Court. The Court expressly held that it was unnecessary "to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a Court's order the government papers in his possession, for the case, as we understand it, raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court." [340 U.S. at p. 467.] In both *Touhy* and *Boske,* this Court relied entirely upon the provisions of the Federal Housekeeping Statute as it stood prior to the later enactment of the 1958 amendment. The continuing validity of *Touhy* and *Boske* is brought into serious doubt by the events

which have occurred subsequent to the rendering of those decisions.

First: The addition of the language, "this section does not authorize withholding information from the public or limiting the availability of records to the public" to the Housekeeping Statute in 1958 radically alters the very substantive provisions of the Housekeeping Statute itself. The purpose of that amendment was to eliminate effectively any further reliance upon the Housekeeping Statute as authority for withholding governmental documents. [*E.g., General Engineering, Inc. v. NLRB*, 341 F. 2d 367, 374 (9th Cir. 1965).] Prior to its enactment, the Statute was utilized by the executive branch of the government as a means of conferring full discretion and final authority concerning disclosure of documents in the hands of the governmental agencies involved. Accordingly, the 1958 amendment removed the primary underpinning for the decisions in *Touhy* and *Boske.*

Second: This Court's decision in *United States v. Reynolds,* 345 U.S. 1 (1952) further undermined the foundation of *Touhy* and *Boske.* In *Reynolds,* this Court held that the decision concerning concealment and non-disclosure of governmental records must ultimately be made by the judicial authority rather than by the executive officer involved. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." [345 U.S. at pp. 9-10.] Moreover, the determination of the availability of the requested documents in *Reynolds* was made in the absence of the appropriate governmental official who had made the decision of non-disclosure. Thus, *Reynolds,* by vesting authority in the Courts, and by eliminating the re-

quirement suggested in *Touhy* that the appropriate government official must be a party to the proceedings, removed the primary bulwarks of the *Touhy* and *Boske* decisions. The undermining effect of *Reynolds* upon this Court's decision in *Touhy* was expressly recognized in Judge Wisdom's decision in *NLRB v. Capitol Fish Co.*, 294 F. 2d 868, 874-5 (5th Cir. 1961).

Third: The anactment of the Federal Freedom of Information Act itself constitutes a positive and far-reaching reversal of the underlying philosophy of *Touhy*. Indeed, the Act expressly provides that "in the event of non-compliance with the order of the Court, the District Court may punish for contempt the responsible employee . . ." [5 U.S.C. §552(a)(3).] As we have already seen, jurisdiction for the enforcement of the provisions of the Freedom of Information Act is concurrently vested in State courts. Accordingly, the insulation from the contempt power which is the gravamen of this Court's decision in *Touhy* and *Boske* has been removed by express Congressional enactment.

Fourth: Touhy was premised upon a valid regulation relied upon by the superior of the employee who refused to produce documents. No such circumstance obtains at bar. The interdicting directive* asserted by the General Counsel of the Department of Housing and Urban Development purported to stem from the authority conferred upon him by appropriate regulations of the Department of Housing and Urban Development. [24 C.F.R. §§15.21 and 15.52.] Those regula-

*The order to withhold the documents occurred *after* the Federal Housing Administration had failed to insulate the records by seeking a judicial determination of their nonavailability under the Act.

tions, however, provide that all intra-agency documents must be made available unless (1) they are exempt from disclosure under the Freedom of Information Act; and (2) there is a need in the public interest to withhold the documents. The amenability of the documents to disclosure under the provisions of the Freedom of Information Act has already been determined by Respondent Court in a proceeding brought by the Federal Housing Administration for that purpose. And no showing whatever was made in that proceeding that there is a need in the public interest to withhold the documents. The burden is clearly upon the Government to justify the withholding of documents. [5 U.S.C. §552(a)(3)] The documents requested concern a Federal Housing Administration insured mortgage which has already been made and which is the subject of State court litigation. The dissemination of such information can hardly be characterized as endangering the national security or in any way as harmful to the public interest.

The Government's continued reliance upon *Touhy* as insulating its employees from complying with Court orders requiring the production of documents pursuant to the Freedom of Information Act has a "chilling effect" upon the very policies and substantive provisions of that statute.* A decision by this Court is necessary to uphold the provisions of the Freedom of Information Act against erosion caused by uncertainty relating to the continuing applicability of *Touhy*. For that reason, a writ of certiorari should issue to review the decision of the Court of Appeal herein.

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*Though *Touhy* was concerned only with the contempt power against a governmental employee, the order sought from Respondent Court was a routine enforcement order provided by the Calif. Discovery Act. [Calif. Code of Civ. Proc. §2034.]

Conclusion.

In his concurring opinion in *U. S. ex rel. Touhy v. Ragen,* Mr. Justice Frankfurter stated that any inference from that decision which would suggest that the proper government official is empowered to forbid his subordinates to cause the production of documents "would be to apply a fox hunting theory of justice that ought to make Bentham's skeleton rattle". [340 U.S. at p. 473.] That is precisely what the government has sought to accomplish in the instant cause. The appropriate government agency sought and received a judicial determination in Respondent Court concerning the amenability of the requested documents to disclosure under the Freedom of Information Act. It now seeks to justify its continued flouting of that decision by resorting to the principles of *Touhy.* That undisguised flaunting of the judicial enforcement of the Freedom of Information Act cannot be properly sustained. A review by this Court is urgently required in order to preserve the provisions of the Act itself against such continuing undermining efforts on the part of the Government.

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

HOWARD I. FRIEDMAN,
Attorney for Petitioner.

ANDREW S. GARB and
LOEB AND LOEB,
Of Counsel.

APPENDIX "A".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California in and for the Second Appellate District.

Community Funding Corp. v. Superior Court, Los Angeles County, Div. 3, No. 35198.

THE COURT: Petition for writ of mandate denied.

Dated: September 2, 1969.

CLAY ROBBINS, Clerk.

APPENDIX "B".

Minute Order of Respondent Court Dated August 15, 1969.

Community Funding Corporation, etc. vs. Los Feliz Towers Apartments, etc. et al. 910109.

NATURE OF PROCEEDINGS:

Motion of Community Funding Corporation to compel H E Walton, Assistant to Director, Federal Housing Administration, and custodian of records to produce documents at deposition pursuant to subpena duces tecum and for reasonable expenses and attorney fees (Submitted Aug 12, 1969)

In this Matter, heretofore submitted, the Court now makes the following order: It appears to the Court that the documents covered by the subpoena duces tecum are relevant to the subject matter of the action and not privileged. Moreover it appears that they are available to the public under 5 U. S. C. Sec. 552 (b)(5) and 24 C. F. R. 915.21(a) (5) since they would be available by law to a party . . . in litigation with the government agency. Good cause has been shown for the production of the documents. Harold E. Walton is normally the custodian of the documents, but his authority to deal with them has been terminated by the General Counsel fo the Department of Housing and Urban Development pursuant to 24 C. F. R. Sec. 15.52. Thus he no longer has the documents under his control and it would be an idle act to order him to produce them. See U. S. ex rel. Touhy v. Ragen, 340 U. S. 462 and People v. Parham, 60 Cal. 2d 378.

The Motion is denied.

Copies of this order are mailed to counsel.

Counsel for plaintiff to give notice.

Aug. 15, 1969 (1) DEPT. 63

APPENDIX "C".

5 U.S.C. §301.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

APPENDIX "D".

5 U.S.C. §552.

§ 552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any

manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference threin with the approval of the Director of the Federal Register.

2. Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final

order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take prece-

dence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on be-

half of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

APPENDIX "E".

24 C. F. R. §§15.21 and 15.52.

§15.21 *Exemptions authorized by 5 U.S.C. 552.*

A requested record shall not be witheld from inspection or copying unless it both (1) comes within one of the classes of records exempted by 5 U.S.C. 552, and (2) there is need in the public interest to withhold it. In determining the scope of the classes of records described in paragraph (a) of this section, the Attorney General's Memorandum on the Public Information Act, June 1967, will be used as a guide.

(a) The classes of records authorized to be exempted from disclosure by 5 U.S.C. 552 are those which concern matters that are:

(1) Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) Related solely to the Internal personnel rules and practices of the Department;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Department;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory files complied for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Department in connection with its responsibility for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

§15.52 *Authority to deny requests for records.*

The officers and their designees described in the preceding §15.51 may deny a request for a record. Any denial shall be promptly made in writing and contain a simple statement of reasons for the denial. Prior to a denial, the officer or designee shall clear the matter with the Office of General Counsel or the office of the appropriate Regional Counsel or, in the case of an officer or designee in any FNMA office, with the Office of the General Counsel, FNMA, or the appropriate FNMA Agency Counsel. Denial shall terminate the authority of the particular officer or designee to release or disclose the requested record, which thereafter may not be made available except with the express authorization of the Secretary or his designee.

SUPREME COURT, U. S.

Office-Supreme Court, U.
FILED
JAN 16 1970
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No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1969

COMMUNITY FUNDING CORPORATION, PETITIONER

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; HAROLD E. WALTON, CUSTODIAN OF RECORDS, FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENT WALTON IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,
ROBERT V. ZENER,
THOMAS J. PRESS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Superior Court of California for the County of Los Angeles (Pet. App. B) is unreported. Neither the Supreme Court of California nor the Court of Appeal rendered an opinion.

JURISDICTION

The judgment of the Court of Appeal (Pet. App. A) was entered on September 2, 1969, and a petition for hearing in the Supreme Court of California was denied on October 29, 1969. The petition for a writ of certiorari was filed on December 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

373-107—70

QUESTION PRESENTED

Whether the courts below properly applied this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, in refusing to enforce a subpoena duces tecum against a subordinate federal official who had been ordered by his superiors not to produce certain documents.

STATUTES AND REGULATIONS INVOLVED

The Federal Housekeeping Statute, 5 U.S.C. (Supp. IV) 301, is set forth at Pet. App. C; 24 C.F.R. 15.21 and 15.52 are set forth at Pet. App. E.

STATEMENT

On May 9, 1969, in the course of discovery proceedings in a civil action between private litigants in California State courts, petitioner, the plaintiff in that suit, sought the production of certain internal records of the Federal Housing Administration which were in the custody of respondent Harold E. Walton, Custodian of Records, Federal Housing Administration. Pursuant to California discovery practice, a subpoena duces tecum was issued by respondent Superior Court and served upon Walton. On June 9, 1969, the Federal Housing Administration moved to quash the subpoena duces tecum on two grounds: (1) that the information sought was protected from disclosure under both the Freedom of Information Act, 5 U.S.C. 552(b)(5), and applicable regulations of the Department of Housing and Urban Development, 24 C.F.R. 15.21, and (2) that under the rule

announced in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, a subpoena duces tecum is ineffective against a subordinate federal official who has been instructed by his superiors not to produce documents. On July 3, 1969, the FHA submitted a supplemental memorandum in support of the motion to quash, further stressing the State court's lack of authority, under *Touhy*, to compel respondent Walton to comply with the subpoena. On July 10, 1969, the motion to quash the subpoena duces tecum was denied by the Superior Court.

After denial of the motion to quash, Walton appeared and refused to produce the documents on the ground that he had been so instructed by his superiors in Washington. Petitioner then moved for an order compelling the production of the documents. Relying principally on this Court's decision in *Touhy* v. *Ragen, supra*, the court denied the motion, stating that such an order would be an "idle act" (Pet. App. B). A petition for a peremptory writ of mandate was denied by the Court of Appeal for the Second Appellate District, and on October 29, 1969, the California Supreme Court denied the petition for a hearing.

ARGUMENT

The courts below correctly applied the clear directive of this Court's decision in *Touhy* v. *Ragen* in refusing to compel a subordinate federal official to produce agency records against the instructions of his superiors. The underlying policy of that decision is the necessity of consistent and responsible decision-making on the question of disclosure of federal docu-

ments and records. As the Court stated (340 U.S. at 468):

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. * * *

The rule announced in *Touhy* deals with the procedure for obtaining federal documents and not the question whether or not the documents must be disclosed; the requisite jurisdiction over the Secretary of Housing and Urban Development, in order to reach the merits of his refusal to produce the documents, was lacking in this case.

Contrary to petitioner's contention, the authority of *Touhy* and its predecessor, *Boske* v. *Comingore*, 177 U.S. 459, has not been undermined by subsequent legislation. Both *Touhy* and *Boske* relied on the Federal Housekeeping Statute, 5 U.S.C. 22,[1] which prior to 1958 provided:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

In response to objections that this statute had been invoked as authority for non-disclosure on the sub-

[1] Now 5 U.S.C. (Supp. IV) 301.

stantive question whether the government was permitted to withhold information in official records, Congress amended the statute in 1958 to add the following sentence:

> This section does not authorize withholding information from the public or limiting the availability of records to the public.

This amendment, however, does not affect the rule of *Touhy* and *Boske* that if a subordinate official is instructed to refuse to produce records, the court must acquire jurisdiction over the head of the department before it can compel disclosure of official information. All the amendment means is that, once such jurisdiction is obtained, the head of the department may not invoke the Housekeeping Statute to justify withholding information. In this case, for example, if a subpoena directed to the Secretary of HUD had been issued from the United States District Court for the District of Columbia, the Secretary could not refuse to comply on the basis of the Housekeeping Statute.[2]

The government raised its defense under *Touhy* in both the memorandum supporting its initial motion

[2] That the 1958 amendment was not intended to affect *Touhy* and *Boske* was made clear by Senator Johnston, the floor manager of the Senate bill, who stated during the Senate debate that those cases "would remain the law of the land." 104 Cong. Rec. 15695 (July 31, 1958). See also Wigmore, *Evidence* (McNaughton rev. 1961), Sec. 2378, p. 803, n. 14: "This amendment of course does not affect the rule laid down in United States ex rel. Toughy v. Ragen, 340 U.S. 462 (1951), to the effect that one must take his demand for information 'upstairs'": accord: 4 Moore, *Federal Practice*, para. 26.25, p. 1553, n. 5.

to quash the subpoena duces tecum, and the later supporting supplemental memorandum. The FHA also based its motion on the ground that the documents sought were not subject to disclosure, but in so doing it merely followed the established practice of presenting alternative arguments, thereby preserving the existing jurisdictional defense. In light of this consistent position on the jurisdictional question, petitioner's inference (Pet. 21) that *Touhy* was raised only after an adverse decision on the claim that the documents were not subject to disclosure is wholly unwarranted.

Petitioner also argues that the documents should be produced under the Freedom of Information Act. But the merits of petitioner's claim to inspect the documents under the Freedom of Information Act need not be reached here, because the State courts have no jurisdiction to enforce the Freedom of Information Act against government agencies. It is true that as between private parties State courts generally have concurrent jurisdiction to enforce federal rights.[3] But State courts do not have jurisdiction over agencies of the federal government, in the absence of an express grant of jurisdiction: the United States may be sued only according to the terms of a statute authorizing suit against the government. *United States* v. *King*, 395 U.S. 1; *United States* v. *Sherwood*, 312 U.S. 584. The Freedom of Information Act subjects federal agencies to suit in the federal courts, but makes no provision for State court jurisdiction. See 5 U.S.C.

[3] See cases cited at pp. 14–15 of the petition.

552(a)(3). Like other federal statutes creating rights enforceable against the government in the federal district courts,[4] the Information Act is not enforceable by suit against the government in the State courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ROBERT V. ZENER,
THOMAS J. PRESS,
Attorneys.

JANUARY 1970.

[4] *E.g.*, the Tort Claims Act, 28 U.S.C. 1346(b); the Tucker Act, 28 U.S.C. 1491; the Suits in Admiralty Act, 46 U.S.C. 742.

U.S. GOVERNMENT PRINTING OFFICE: 1970